No. 16055

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ANACONDA COMPANY, a corporation,
Appellant,

-vs.-

BUTTE MINERS UNION NO. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, et al.,
Appellees.

BRIEF OF APPELLANT

W. M. KIRKPATRICK,
P. L. MacDONALD,
SAM STEPHENSON, JR.,
JOSEPH B. WOODLIEF,
R. LEWIS BROWN, JR.,
WILLIAM J. KELLY,
Hennessy Building,
Butte, Montana,
Attorneys for Appellant.

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STATEMENT OF JURISDICTION

This is an action brought by the plaintiffs-appellees to compel specific performance of arbitration provisions contained in certain collective bargaining agreements between the parties (R. 8-9). Suit was filed under the provisions of Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 USCA, Section 185 (R. 4), and defendant-appellant admitted in its answer that the District Court had jurisdiction under said Act (R. 17); that defendant-appellant was engaged in an

industry affecting commerce (R. 4, 17), and that plaintiffs-appellees are labor organizations as defined in said Act (R. 4, 17). Both parties filed a motion for summary judgment (R. 22-23), and this appeal is from a final judgment granting plaintiffs-appellees' motion for a summary judgment based upon the pleadings and admissions filed in this case (R. 38-39).

STATEMENT OF CASE

Defendant-appellant is hereinafter called the "defendant" and plaintiffs-appellees are hereinafter called the "plaintiffs."

Volume I of the Record is referred to as "Record," and Volume II of the Record is referred to as "Supplemental Record."

The defendant is a Montana corporation and is engaged in the mining business in Butte, Montana, and the smelting business at Great Falls and Anaconda, Montana (R. 5, 17). The plaintiffs are unincorporated labor organizations and represent the employees of the defendant at the three above-named operations for the purpose of collective bargaining (R. 5, 17). The defendant and the plaintiffs have negotiated and entered into collective bargaining agreements over a period of many years (R. 5, 6, 17). Among the provisions of these agreements there is one providing for the settlement of grievances:

> "WALKOUTS, LOCKOUTS, PROTECTION OF PROPERTY:
>
> "During the life of this agreement the Union agrees that there shall be no collective cessation

of work by the members of the Union on account of any controversy with the Company respecting the provisions of this agreement, or any other controversy that may arise between the parties to this agreement, until and unless all of the means of settling any such controversy under the provisions of this agreement, or otherwise, shall have failed. The Company agrees that it will not lock out the employees covered by this agreement on account of any controversy with the employees respecting the provisions of this agreement, or any other controversy that may arise between the parties to this agreement, until and unless all other means of settling such controversy under the provisions of this agreement, or otherwise, shall have failed; * * *

* * * * *

"GRIEVANCES:

"Any grievance or misunderstanding concerning any rule, practice or working condition, or any other grievance which cannot be settled on the job between any employee and his employer, must be first taken up with the Management by said employee or his representative, and in case a settlement cannot be made, the subject matter which caused the grievance must be taken up with a committee representing the Union and a committee of the Company. * * *" (R. 29-30.)

After providing for the various steps through which a grievance shall be processed, the agreements provide that the grievance shall be submitted to arbitration.

The so-called grievance clauses in all the agreements are identical insofar as they are material here, and have remained the same during the period with which we are concerned (R. 5, 6, 9-16, 17).

The most recent collective bargaining agreements were effective July 1, 1956, and are to remain in effect until June 30, 1959 (Sup. R. Def. Exhibits "J", p. 1; "K", p. 1; "L", p. 1).

Another provision of the collective bargaining agreements that is material here is as follows:

> "SUBJECTS AND EXPENSES OF ARBITRATION:
>
> "No question of a change in the wage scale or differentials shall be the subject of arbitration. The fees and expenses of such arbitrator shall be borne equally by the Union and the Company." (R. 31.)

On November 13, 1951, the parties entered into settlement agreements providing for amendments to the collective bargaining agreements and in addition providing that they would negotiate a pension plan for employees at each operation (Sup. R. Def. Exhibits "A", p. 3; "D", p. 3; "G", p. 3).

On March 14, 1952, agreements were entered into which established the pension plan. These agreements were to remain in effect until June 30, 1956. For the purposes of this litigation the provisions of these pension agreements and plans are identical (Sup. R. Def. Exhibits "A", "D", "G", also R. 26).

Section 9 of the 1952 pension agreements (R. 20 and Sup. R. Def. Exhibits "A", p. 3; "D", p. 3; "G", p. 3) reads as follows:

> "Section 9. Independence of Plan and Pension Plan Agreement
>
> "Notwithstanding anything to the contrary herein or elsewhere contained or implied, the Plan and this Agreement together constitute

the Pension Plan provided for in Section V of the Supplementary Agreement between the parties dated November 13, 1951, and the entire agreement and understanding of the parties with respect to such Section V. This Agreement shall not be construed to be a part of, or collateral or supplemental to, the Collective Bargaining Agreement dated April 10, 1950, as amended by the Supplementary Agreement dated November 13, 1951, between the Company and the Union."

In the pension plans themselves we find (Sup. R. Def. Exhibits "A", pp. 14-15; "D", pp. 14-15; "G", pp. 14-15) the following provisions:

"Section 4

"Administration

"4.1 Operation and Administration of the Plan:

"The Company shall solely be responsible for and solely have control of the operation and administration of the Plan, and shall adopt such rules and regulations as may be necessary for the efficient operation and administration of the Plan.

"4.2 Joint Administrative Procedure Board:

"A Joint Administrative Procedure Board shall be established by the Employing Company and each Union that has entered into a Pension Agreement with such Company. Each such Board shall consist of not more than six members, one-half of whom shall be designated by the Employing Company and one-half of whom shall be designated by the Union. The representatives of the Employing Company and the Union shall each collectively have one vote. If any difference should arise between any Employing Company and any Employee or Pensioner as to a question of fact as set forth in Section 5, such question shall be referred by the

Employing Company to the appropriate Joint Administrative Procedure Board. Each Joint Administrative Procedure Board, in its discretion, may establish standardized procedures and appoint such sub-committees as it deems necessary for the efficient processing of such questions. Each such Board shall be furnished at the end of each calendar year with a report from the Company regarding the operation of the Pension Plan by the Company in so far as it affects the Employees in the bargaining unit represented by the Union concerned.

"Section 5

"Appeals Procedure

"5.1 As to Age, Years of Continuous Service or Average Monthly Earnings:

"The Employing Company shall refer to the appropriate Joint Administrative Procedure Board any difference which it may have with an Employee or Pensioner as to: (a) the number of years of continuous service of such Employee or (b) the age of such Employee or (c) the average monthly earnings used for pension calculations under Section 3. If the Joint Administrative Procedure Board cannot reach a decision or if the Employee or Pensioner is not represented by a Joint Administrative Procedure Board the question shall be submitted for arbitration to the American Arbitration Association. The American Arbitration Association shall have authority only to decide the question pursuant to the provisions of the Plan, but shall not have authority in any way to alter, add to or subtract from any of such provisions. The decision of the American Arbitration Association on any such question shall be binding on the Company, the Employing Company, the Joint Administrative Procedure Board, the Employee and his duly authorized representative.

"5.2 As to Cause, Existence or Continuance of Permanent and Total Disability:

"The Employing Company shall refer to a Medical Board any question as to whether Employee, if he shall have been determined to be permanently and totally disabled, but shall not have reached his normal retirement date, became permanently and totally disabled through some unavoidable cause, or whether such Employee is permanently and totally disabled or whether such Pensioner continues to be permanently and totally disabled. Such difference shall be resolved by the Medical Board which shall consist of three physicians, one appointed by the Employing Company, one appointed by the Union representing such Employee or by the Employee, if he is not represented by a Union, and the third selected by such two physicians. The fees and expenses of the physicians shall be borne by the party appointing such physician and the fees and expenses of the third physician shall be shared equally by such parties. The opinion of a majority of such Medical Board shall be final and binding upon the Company, the Employing Company, the Joint Administrative Procedure Board, the Employee and his duly authorized representative."

On October 15, 1954, the parties agreed to amend the pension agreements and plans (Sup. R. Def. Exhibits "B", p. 1; "E", p. 1; "H", p. 1). The last sentence of Section 9 was amended to read as follows:

"This Agreement is a distinct and separate document, which, it is agreed, is not to be and shall not be construed to be a part of, or collateral or supplemental to, *any collective bargaining agreement.*" (Emphasis added.)

Sections 4, 5 and 6 of the plans remain unchanged.

These agreements and plans as amended were to terminate on December 31, 1957 (Sup. R. Def. Exhibits "B", p. 1; "E", p. 1; "H", p. 1).

Shortly after the October 15, 1954, amendments to the pension plans, the defendant adopted a policy of retiring employees at the age of 68 in accordance with the provisions of Section 2.1(c) of the plan (R. 18). Some of these employees did not have the required number of years of service to entitle them to pension payments under the plan. The plaintiffs objected to the retirement of these employees and presented grievances concerning them in accordance with the grievance procedure set forth in the collective bargaining agreements. The plaintiffs took the position that the defendant could not retire an employee at the age of 68 unless he had sufficient years of service to entitle him to a pension. The defendant refused to accept these grievances and to process them through the arbitration procedure provided for in the collective bargaining agreements (R. 18).

On June 29, 1956, the Butte and Anaconda pension plans and agreements were again amended and provide for termination on June 30, 1960, and similar amendments were made July 7, 1956, in the Great Falls pension plan and agreement (Sup. R. Def. Exhibits "C", "F", "I"). None of the other amendments are material to this case. At the same times the collective bargaining agreements presently in effect were entered into (Sup. R. Def. Exhibits "J", "K", "L").

On October 22, 1957, the plaintiffs filed suit against the defendant in the United States District Court requesting that the Court issue an order to compel the defendant to arbitrate the question of the right to retire employees at the age of 68 who did not qualify for pensions (R. 3-16).

The defendant filed its answer denying that this dispute was arbitrable under the provisions of either the collective bargaining agreements or the pension agreements and plans (R. 16-22). The defendant then filed its request for an admission that the various exhibits attached to its answer were true and correct copies of the original documents. The plaintiffs made the requested admission.

Both parties then filed motions for a summary judgment (R. 22-23). After the hearing the District Court entered a decision in favor of the plaintiffs and issued a Memorandum in support of its decision (R. 25-37). The judgment directed the defendant to submit the dispute to arbitration in accordance with the grievance and arbitration provisions of the collective bargaining agreements (R. 38-39). The Defendant has now appealed from this decision (R. 40).

SPECIFICATION OF ERROR

The Court erred in entering judgment for the appellees upon appellees' Motion for Summary Judgment for the reason that the pleadings herein show that the appellant is entitled to a judgment as a matter of law (R. 43).

INTRODUCTION TO ARGUMENT

The dispute that gave rise to this case originated with the demand of the plaintiffs that defendant's right to retire employees at the age of 68 who did not qualify for a pension be submitted to arbitration under the terms of the collective bargaining agreements (R. 7-8). We are not concerned with the details of the particular dispute, but only with the question of whether or not the parties intended that disputes arising out of the interpretation and application of the pension agreements and plans should be subject to the grievance and arbitration provisions of the collective bargaining agreements. Therefore, the question to be determined is the intention of the parties at the time the agreements and plans were negotiated. This intention can easily be determined by an examination of the provisions of the collective bargaining contracts together with the provisions of the coexisting but separate pension agreements and plans.

The District Court in its memorandum decision cites the case of Textile Workers v. Lincoln Mills, 353 U. S. 448, and also General Electric Co. v. Local 205, etc., 353 U. S. 547. These cases hold that, if there is an agreement to arbitrate, then such a provision in the collective bargaining agreement can be enforced through an action in a Federal District Court for specific performance. However, it would seem obvious that the Court must first determine that there is a specific agreement to arbitrate the particular dispute involved. This rule is clearly

stated in Refinery Employees' Union v. Continental Oil Company (D.C. W.D.La.), 160 F. Supp. 723, as follows:

> "Defendant asserts that just because the dispute is 'grievable', it does not necessarily follow that it was also arbitrable and insists that this Court must determine as a matter of law whether there has been any agreement to submit the particular issue in question to arbitration. We agree that this is so. Engineers Ass'n v. Sperry Gyroscope Co., etc., 2 Cir., 1957, 251 F.2d 133, and Local No. 149, etc. v. General Electric Company, 1 Cir., 1957, 250 F.2d 922."

This same principle is also clearly stated in New Bedford Defense Prod. Div. v. Local No. 1113, etc. (C.C.A. 1st), 258 F. (2d) 522. Here the Court used the following language:

> "This appeal is from a decree, under § 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A. § 185 ordering appellant Company to submit a certain grievance claim to arbitration. For another case decided by us today involving the same statute, see Boston Mutual Life Insurance Co. v. Insurance Agents' International Union, AFL-CIO, 258 F. 2d 516. There, we reaffirmed the position this court had previously taken, that when one of the parties to a collective bargaining agreement invokes the aid of a court of equity, under § 301, and asks the court for a decree of specific performance of a contract to arbitrate, the court, before rendering such a decree, has an inescapable obligation to determine as a preliminary matter whether the defendant did contract to refer the issue to arbitration."

Furthermore, when the parties to a contract agree to delegate the duty of settling disputes to a third party rather than the courts, such delegation must

be made manifest by plain language. See United States v. Moorman, 70 S. Ct. 288, at page 291.

It is defendant's contention that, with certain exceptions, it has not agreed and never intended to agree to arbitration of disputes involving the terms of the pension plans. Therefore, there is no agreement to be specifically enforced by the Court.

I.

THE COURT MUST DETERMINE AND GIVE EFFECT TO THE INTENT OF THE PARTIES

The authorities are in complete accord that, in cases involving a contract or contracts, the court must, if possible, determine the intent of the parties. In 17 C.J.S. § 295 at page 689, we find the following statement:

> "The primary rule in the construction of contracts is that the court must, if possible, ascertain and give effect to the mutual intention of the parties, so far as that may be done without contravention of legal principles, statutes, or public policy, and statutes in some jurisdictions embody this rule. Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent."

A similar statement is found in 12 Am. Jur. § 227 at page 745. Both of the above authorities cite a vast number of cases in support of their statements.

It was, therefore, the *primary* duty of the District Court to make every effort to determine the intention of the parties by an examination of all the documents involved and not only the collective bar-

gaining agreements. The District Court's Memorandum makes it clear that the pension agreements and pension plans were not considered in arriving at its decision. We refer to the following statement:

> "However, it is the collective bargaining agreements which must be construed to determine the narrow issue presented in this case, and not the pension agreements." (R. 28.)

By confining its analysis to the collective bargaining agreements alone without consideration of the pension documents, it seems clear that the District Court has not performed its primary duty. This seems particularly true as the dispute involves the question of arbitrating a controversy over an interpretation of the pension plans, which are separate documents and not part of the collective bargaining agreements.

It would seem apparent that, in order to determine the intention of the parties as expressed in separate but coexisting agreements, all the instruments must be considered.

When several contracts are involved in the same dispute, it is perfectly clear that they should all be considered to see whether the parties intended them to be construed together or as separate contracts.

We find the following language in 12 Am. Jur. § 246 at page 783:

> "Where the terms employed to express some particular condition of a contract are ambiguous and cannot be satisfactorily explained by reference to other parts of the contract and the parties have made other contracts in respect of the same subject matter, apparently in pursuance of the same general purpose, it is always per-

missible to examine all of them together in aid of the interpretation of the particular condition; and if it is found that the ambiguous terms have a plain meaning by a comparison of the several contracts and an examination of their provisions, that meaning should be attributed to them in the particular condition. Interpreting contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice so that the intent of the parties may be carried out and the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments and to provide for entirely different things. All instruments which are executed at the same time and relate to the same subject are treated and interpreted as one. This is done, however, only to effectuate the intention and only where the provisions of the two instruments, if put together, will not be incompatible. Where contracts are put into several instruments, each of which has a sensible meaning and may have a full operation by itself, it would be a hazardous assumption to put them together for the purpose of making them mean, as one, differently from what they could in this separate state. Certainly, the court cannot do such violence to the intentions of the parties and the language in which they are expressed as to consolidate separate instruments where the effect of doing so would be to avoid an essential part of the contract."

Also in 17 C.J.S. § 298 at pages 714 and 715 it is stated:

"As a general rule, sometimes by reason of express statutory provision, where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other. This is true, although the instruments do not in terms refer to each other. So if two or more agreements are executed at different times as parts of the same transaction they will be taken and construed together.

"Where contracts or writings are in fact independent, however, they should not be considered together, although the parties may be the same, or the same subject matter may be concerned, and where there are several contracts in the same matter of different dates, or when one is plainly intended to supersede the other, the later will control. So if there is a plain repugnancy betwen the provisions of an original contract and those of a supplemental one between the same parties and relating to the same subject matter, the earlier contract must yield to the later as far as the repugnancy extends."

Certainly it is most improper to consider only one of the documents when an examination of the other documents will clearly show the intention of the parties with respect to all the documents. Yet, that is what has been done in this case. By this simple device the District Court has voided the clear and unmistakable language of the pension agreements and plans and rendered that language meaningless.

In fact, the District Court has not attempted to construe the documents as a single contract nor as separate contracts. It has, in effect, simply ignored the pension agreements and plans.

The defendant submits that the pension plans and

agreements must be given as full and complete force and effect and as full consideration by the Court as the provisions of the collective bargaining agreements. Only in this way can the intention of the parties be properly determined.

II.

THE PROVISIONS OF THE PENSION AGREEMENTS AND PLANS CONCLUSIVELY SHOW THEY ARE DISTINCT AND SEPARATE AGREEMENTS

There is an abundance of evidence in the pension plans and agreements clearly showing that it was not the intention of the parties to make their provisions subject to the grievance provisions of the collective bargaining agreements, and particularly the arbitration provisions.

The first and most conclusive evidence of this intention is contained in Section 9 of the pension agreements entered into between the parties March 14, 1952 (*supra*, pp. 4-5).

This provision shows that the parties hereto consummated a collective bargaining agreement on November 13, 1951, wherein they agreed in Section V thereof to enter into a pension plan covering defendant's employees. The pension agreements show that the terms and conditions of the pension plans were agreed to on March 14, 1952 (Def. Exhibits "A", "D", "G"). On the latter date the collective bargaining agreements of April 10, 1950, as amended November 13, 1951, were in effect, including the

grievance and arbitration clauses. Instead of amending the collective bargaining agreements, the parties agreed to the last sentence of Section 9 so as to specifically exclude the pension plans from the provisions of the collective bargaining agreements. About the only provision of the latter agreements that could affect the pension agreements and plans would be the grievance and arbitration provisions. Thus, it seems perfectly evident that it was clearly the intention of the parties in 1952 to exclude the pension agreements and plans from the arbitration provisions of the collective bargaining agreements, and this was done by the explicit language used in Section 9 of the pension agreements.

It is fundamental that the parties to a contract can amend, limit, extend, supplement, cancel or change any written contract by entering into another written contract. The only limitation is that there must be mutual consent to the second contract and it must not be for an illegal purpose or against public policy. This principle is set forth in 12 Am. Jur. § 405 at page 983 as follows:

> "Secondary or New Agreements Affecting Prior Contracts.—The parties to any contract, if they continue interested and act upon a sufficient consideration while it remains executory, and before a breach of it occurs, may by a new and later agreement rescind it in whole or in part, alter or modify it in any respect, add to or supplement it, or replace it by a substitute. Those who have made a contract may always supplement it by another one. However, no abrogation, change, modification, or substitution in a primary contract can be effected by the sole action of one of the parties to it. The

consent of both is required to cancel, alter, or supplant a contract fairly made. The same meeting of minds is needed that was necessary to make the contract in the first place.

"The original contract may be discharged before breach by the mere making of a new agreement or only by the performance thereof, depending upon the intent of the parties. Similarly, after breach of the original contract the claim for damages may be discharged by the performance of a new agreement or by the mere making thereof according to the meaning of the agreement. A new agreement affecting a former agreement may be classified as an accord and satisfaction, an account stated, a compromise and settlement, a novation, or a release, according to whether it meets the requirements of one or another of such particular forms of agreements of discharge, which are discussed in other articles.

"The validity of a mutual agreement to alter, modify, qualify, or supersede by another a contract previously entered into by the parties is unaffected by the proximity in time of such agreement to the primary contract. If it is really in sequence, plainly a distinct and independent affair, it will be valid and effective, even if entered into before the parties separate, after making the primary contract."

See also 17 C.J.S. § 373 at page 857. It is equally true that the same parties can enter into a separate contract on a separate subject matter and by its express terms exclude it from any of the provisions of the other contract. The only question is whether the parties intended that there should be such an exclusion. In this case, such an intent is conclusively shown by Section 9 of the pension agreements.

Another clear indication of the intention of the

parties is found in the amendments to the pension agreements dated October 15, 1954. The language of the last sentence of Section 9 above quoted *(supra*, p. 5) was changed from "the Collective Bargaining Agreement dated April 11, 1950, as amended by the Supplementary Agreement dated November 13, 1951," to "any collective bargaining agreement." (*Supra*, p. 7.) The purpose of the change is evident when it is realized that the termination dates of the collective bargaining agreements have not been and are not now the same as the termination dates of the pension agreements. For example, the present collective bargaining agreements are for a term ending June 30, 1959 (Sup. R. Def. Exhibits "J", p. 1; "K", p. 1; "L", p. 1), while the pension agreements are to remain in effect until June 30, 1960 (Sup. R. Def. Exhibits "C", p. 1; "F", p. 1; "I", p. 1). Thus it is again conclusively shown that the parties arrived at a clear understanding at the collective bargaining table that the pension agreements and plans would stand by themselves and not be subject to the provisions of the collective bargaining agreements.

Still another indication that the pension plans were not to be subject to the grievance and arbitration provisions of the collective bargaining agreements is found in the provisions of Sections 4 and 5 of the plans (*supra*, pp. 5-7). These sections, in effect, provide the grievance and arbitration procedure with respect to the pension plans. Obviously, if it had been intended to make the provisions of the plans

subject to the grievance and arbitration provisions of the collective bargaining agreements the above-quoted provisions would be wholly unnecessary. It is equally obvious that the intention was to provide for arbitration of the provisions of the pension plans only with respect to three items; namely, age, earnings and length of service. Yet the District Court by the simple device of saying that this case is brought under the provisions of the collective bargaining agreements has held that they are the only agreements to be construed by the Court; therefore, the limitations set forth in the pension plans become wholly meaningless. This decision, then, leaves it to the arbitrator and not the Court to construe every and all the provisions of the pension plans without any limitation and to determine the intention of the parties. This decision ignores the specific limitations set forth in the pension plans and circumvents and nullifies the obvious intention of the parties.

The reason for the provision that only three matters under the pension plans should be subject to arbitration seems clear. "Company" is defined as Anaconda Copper Mining Company (now The Anaconda Company). "Subsidiary Company" is also defined (Sup. R. Def. Exhibits "A", p. 7; "D", p. 7; "G", p. 7). It is common knowledge that the defendant herein has operations all over the United States, and that the intention was to have a uniform plan. The trust fund that must be provided to insure the payment of pensions to its retired employees is a very substantial fund. Furthermore,

the plans must be approved by the Commissioner of Internal Revenue before the payments under the plans are deductible under the provisions of the Internal Revenue Code (Sup. R. Def. Exhibits "A", p. 1; "D", p. 1; "G", p. 1). It is most natural and understandable that defendant would want the interpretation of the plans made by a Court familiar with the law rather than an arbitrator who might or might not be familiar with the law and from whose decision it might or might not have the right of appeal. Furthermore, to insure uniformity, the plans specify that they should be "construed and administered in accordance with the Laws of the State of New York." (Sup. R. Def. Exhibits "A", p. 16; "D", p. 16; "G", p. 16.) In this connection the lower Court ignored the applicable law and left this matter for the arbitrators to determine.

It is significant that in all the collective bargaining agreements since Section 9 was agreed to in 1952, there has not been and is not now any mention of the pension agreements or plans in the collective bargaining agreements. This again indicates that the pension plans and agreements were intended to be separate and distinct agreements and to stand by themselves.

Defendant submits that both the collective bargaining agreements and the pension agreements and plans must be considered in determining the intention of the parties, and the intention to exclude pension disputes from the provisions of the collective bargaining agreements is conclusively shown by the

above-cited sections of the pension plans and agreements.

III.

THE LANGUAGE OF THE PENSION AGREEMENTS AND PLANS IS SO CLEAR THAT THERE IS NO NEED FOR CONSTRUCTION

It should be pointed out that the pension plans and agreements were not instituted unilaterally by the defendant but were entered into after agreement had been reached over the collective bargaining table. There is a legal presumption that the parties knew and understood what they were agreeing to when they entered into the pension agreements. It seems inconceivable that anyone could read the statement in Section 9 of those agreements that each is a "distinct and separate document, which, it is agreed, is not to be and shall not be construed to be a part of, or collateral or supplemental to, any collective bargaining agreement" and then conclude that the very agreement referred to is subject to the collective bargaining agreements. Yet in deciding a suit brought under the terms of the collective bargaining agreements based on an alleged breach of the pension plans, the District Court renders this language meaningless and declares that the pension plans are subservient to the collective bargaining agreements. Here there is no room for argument that it was the intention of the parties to exclude the provisions of the pension plans from arbitration. This is clearly expressed in Section 9. Where the language of a

contract is clear and unambiguous, as in this case, there is no need for construction. In 12 Am. Jur. § 227 at page 747 we find the following:

> "It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument. This language must be sufficient, when looked at in the light of such facts as the court is entitled to consider, to sustain whatever effect is given to the instrument. Taking into consideration this limitation, it may be said that the object of all rules of interpretation is to arrive at the intention of the parties as it is expressed in the contract. In other words, the object to be attained in interpreting a contract is to ascertain the meaning and intent of the parties as expressed in the language used."

Also, 17 C.J.S. § 294 at pages 683-685 states:

> "A court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language, but will enforce or give effect to the contract according to its terms, in the absence of fraud or other grounds affecting enforcement according to its terms."

We submit that Section 9 of the pension agreements falls fully within the above rules and relieves the Court from the necessity of construing the grievance clauses of the collective bargaining agreements.

IV.

THE DISTRICT COURT RECOGNIZED THAT EXCEPTIONS CAN BE MADE FROM THE GRIEVANCE AND ARBITRATION PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENTS

The District Court in its analysis of the provisions of the grievance and arbitration procedure under the collective bargaining agreements points out that the parties included a provision that "No question of a change in the wage scale or differentials shall be the subject of arbitration." (R. 31.) It then concludes that these two items are the only ones that the parties desire to exclude. Thus, the Court recognized the right of the parties to exclude certain matters from the so-called broad provisions of the collective bargaining agreements but only to the extent that the limitations are set forth in those agreements. Defendant knows of no rule of law or reason that will not permit the parties to make a separate and distinct agreement providing for a third exception from the arbitration provisions of the collective bargaining agreements. That is exactly what has been done in this case. It is absurd for the District Court to say that the only exception that can be made must be in the agreement itself or in a supplement to the collective bargaining agreements (R. 34). In the District Court's Memorandum we find the following.

> "In Local 205, etc. v. General Electric Co., 233 F. (2d) 85, affirmed, 353 U. S. 547, the Court of Appeals for the First Circuit said:

> " 'The scope of an arbitration pledge is solely for the parties to set, and thus the determination of whether a particular dispute is arbitrable is a problem of contract interpretation.' "

This quotation definitely shows that this may be done and that the scope of the arbitration clause may be limited by the parties. Here this was done in documents separate from the collective bargaining agreements.

If you accept the theory of the District Court it would be impossible for the parties to negotiate a separate contract on some matter not covered by the then existing collective bargaining agreements and not have the provisions thereof subject to the grievance and arbitration provisions of the collective bargaining agreements. It would only be necessary to file a suit for specific performance under the collective bargaining agreements and the terms and conditions of the separate agreement would be subject to arbitration even if the parties had agreed they were not arbitrable. Such a situation would not promote harmonious labor relations. This method could be used by either party to defeat the clearly expressed intention of the parties that the provisions of the separate agreement would not be subject to arbitration. Imagine a situation such as this: The parties enter into contract "A" with an arbitration provision. Subsequently they enter into contract "B" and provide that "B" will not be subject to the arbitration provisions of contract "A". Both "A" and "B" involve conditions of employment. Then one of the parties files suit to compel

the arbitration of a question arising under the provisions of contract "B" but alleges that the suit is filed for specific performance under the provisions of contract "A". If the decision of the District Court in the present case is sustained, then the provisions of contract "B" become subject to arbitration under contract "A" despite the fact that contract "B" provides otherwise. A decision by the Court of Appeals to that effect would upset and confuse collective bargaining relations throughout the entire United States.

Furthermore, the District Court holds that because the defendant did not insist in the negotiations in 1956 that a clause be included in the collective bargaining agreements excluding pension disputes, it thereby demonstrated an intention not to exclude these disputes (R. 35). It is much more logical to say that the failure of the plaintiffs to insist on a provision making such disputes subject to arbitration under the collective bargaining agreements, or to insist on amending the pension agreements and plans to so provide, was an indication of the intention on the part of the plaintiffs to exclude the disputes from arbitration. Plaintiffs are the complaining parties, and certainly the burden was upon them to demand the necessary changes to make sure that the pension agreements and plans were subject to arbitration. They were fully aware of the disputes at the time of these negotiations in June, 1956 (R. 24), yet they did not take advantage of their opportunity to eliminate Section 9 from the pension

agreements or to amend the limitations set forth in Sections 4 and 5 of the plans.

The District Court quotes the provision from the collective bargaining agreements the sentence "This contract is exclusive" etc., and concludes that this sentence prevents any consideration of the pension plans and agreements in determining the question of arbitrability. We feel that this conclusion is without merit. Certainly the same parties may at any time sit down and mutually agree to another contract on a subject matter not included or covered by the collective bargaining agreements and provide therein that it would or would not be subject to the provisions of the collective bargaining agreement. See: 12 Am. Jur. § 405 at pages 493 and 494; also 17 C.J.S. § 373 at page 587. If this right did not exist it would be impossible to correct inequities or adjust controversies that might arise during the term of the contract. We are certain that such a condition would not be acceptable to either party as it would render their contractual relations too inflexible to promote harmonious labor relations.

CONCLUSION

We submit that the District Court committed manifest error in granting plaintiffs' motion for summary judgment and in denying that of defendant in the face of the admitted facts in this case.

We submit that the judgment for the plaintiffs

should be dismissed with directions to enter a judgment in defendant's favor.

Respectfully submitted,

W. M. KIRKPATRICK,
P. L. MacDONALD,
SAM STEPHENSON, JR.,
JOSEPH B. WOODLIEF,
R. LEWIS BROWN, JR.,
WILLIAM J. KELLY,
Hennessy Building,
Butte, Montana,
Attorneys for Appellant.